

COMMONWEALTH OF VIRGINIA

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SENATOR MAMIE LOCKE, Vice Chair
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VIRGINIA HOUSING COMMISSION

SUMMARY

Neighborhood Transitions and Residential Land Use Work Group

July 31, 2012

10:00 AM

House Room C

I. Welcome and call to order:

- **Delegate Rosalyn R. Dance, Chair**; called the meeting to order at 10:01 AM.
 - In addition to the invited speakers the following Workgroup members were in attendance:
 - **Legislators:** Delegate David Bulova; Delegate Rosalyn R. Dance; Senator Mamie Locke; Delegate Danny Marshall
 - **Non-Legislator Workgroup Members:** Mark Flynn, *Virginia Municipal League*; Tyler Craddock, *Manufactured and Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Bill Ernst, *Department of Housing and Community Development*; Brian Gordon, *Apartment and Office Building Association*; Kelly Harris-Braxton, *Virginia First Cities*; Ted McCormack, *Virginia Association of Counties*; Barry Merchant, *Virginia Housing Development Authority*; and Michael Toalson, *Home Builders Association of Virginia*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*; Iris Fuentes, *Administrative Assistant*; Laura Perillo, *legal intern*.

II. Performance Guarantees; street construction (HB 731, Del. L. M. Dudenhefer, 2012)

- **Del. Dance** stated that Delegate L. M. Dudenhefer was not available to discuss his bill, but that Mr. Patrick Cushing and Mr. Michael Smith are speaking in favor of Del. Dudenhefer's bill regarding performance guarantees for street construction.
- **Mr. Patrick Cushing, Representing Stafford County; Williams Mullen**; explained that §15.2-22-45 currently allows localities to adopt ordinances that require performance guarantees from developers for projects in subdivisions, including streets. Mr. Cushing stated that according to the current procedure, when a developer completes 30% of the street, he can ask the local government for partial release of 30% of the performance

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

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guarantee. Mr. Cushing explained that developers can ask the local government for partial release three times during one project and that new releases can be made as a partial release up to 90% of the performance guarantee. Mr. Cushing stated that the final 10% of the performance guarantee is not released to the developer until the street is accepted into the state system or approved and accepted into the local government system.

- **Mr. Cushing** stated that as a result of §15.2-22-45 as it is currently written, Stafford released 90% of performance guarantees to developers for subdivision road projects, the roads have deteriorated and are not up to state standards, and the developer is no longer there to improve the roads. According to Mr. Cushing, as a result of this, the county and the respective home owners associations are left to complete the subdivisions' streets and bring the streets up to state standards.
- **Mr. Cushing** stated that HB 731 sought to introduce a solution to deteriorating streets where the homeowners' association, development, or locality is left to pay for the repairs to the street. As it was introduced in 2012, HB 731 sought to remove the release provision from §15.2-22-45 and require that when a subdivision street performance guarantee is entered, it cannot be released partially or in full until the subdivision street has been accepted into the state or local system. Mr. Cushing explained that HB 731 included many provisions that he and his constituents later realized were not essential to solve Stafford's problem with the performance guarantees, such as provisions prohibiting an occupancy permit or a building plan to be approved by the county if a developer had faulty security on the books. Mr. Cushing explained that these provisions should be deleted from any new bill that is drafted to solve the performance guarantee problem.
- **Mr. Cushing** continued, stating that he and his constituents spoke with developers about amending §15.2-22-45 to release up to 50% of the performance guarantee to developers, thereby allowing the locality to keep 50% of the performance guarantee to cover the cost of street completion and repair. Mr. Cushing stated that he and his constituents have not drafted a bill including the 50% language discussed with the developers and that the developers ultimately did not agree with that amount.
- **Delegate Danny Marshall** stated that the reason HB 731 is before the Neighborhood Transitions and Residential Land Use Work Group is because Stafford, only one locality, gave the developer monies from their performance guarantee and were left to repair and complete subdivision roads at its own cost. Del. Marshall asked Mr. Cushing whether there were or are any other localities facing this problem and whether this happened as a result of the economic downturn.
 - **Mr. Cushing** stated that the outer rim of Northern Virginia experienced a huge housing boom and a huge housing crash as a result of the economic downturn. Mr. Cushing continued, stating that as a result there are many subdivisions in this area that have not been and are not being completed according to the original performance guarantees that were entered prior to the housing crash. According to Mr. Cushing, HB 731 is seeking to address this situation and prevent performance guarantees from being released prematurely in the future.
- **Del. Marshall** asked whether the localities have an opportunity to negotiate the release percentages when the developer is making draws regarding the subdivision.
 - **Mr. Cushing** stated that localities have an opportunity to negotiate the release percentages when they are negotiating the performance agreement with developers

regarding the subdivision. Mr. Cushing stated that in the case of a partial release, releases are not initiated until at least 30% completion of the project.

- **Mr. Michael Toalson**, *Home Builders Association of Virginia*; stated that there are already provisions in place that protect the localities and home owners associations from the problem Stafford is experiencing.
 - **Mr. Toalson** stated that another provision of the statute ensures that local governments are given the authority to dictate their own performance agreements with developers. Mr. Toalson explained that a performance agreement generally contains provisions which state that a developer will build an agreed upon extension for public improvement in accordance with a certain standard. Mr. Toalson explained that localities demand a performance bond from developers prior to starting construction to guarantee that the developer builds the extensions in accordance with the localities standards. Mr. Toalson also stated that it is business custom that developers must sign a performance agreement prior to starting the construction project. Mr. Toalson stated that this ensures that the local governments have the ability to dictate the schedule of their performance bond releases to the developer.
 - **Mr. Toalson** stated that the performance bonds that are now causing Stafford problems were posted prior to 2009. Mr. Toalson explained that prior to 2009, developers posted performance bonds for the amount equal to the amount estimated for the quality of improvements plus at least 25%. Mr. Toalson explained that the bonds causing problems in Stafford were for amounts equal to at least 125% of the anticipated cost of construction for the given subdivisions. Mr. Toalson stated that where a developer receives a release when he has finished 90% of the project, the developer received 35% less than the amount posted. Mr. Toalson stated that the developers leave the localities with 35% of the anticipated cost of the project after the developer receives its 90% release. According to Mr. Toalson, 35% of the anticipated cost of the project is more than enough money to complete and/or maintain the roads.
 - **Mr. Toalson** added that in 2009 the percentage of the anticipated cost of construction for the performance bonds was reduced to 110% by legislation introduced by Del. Marshall. Mr. Toalson stated that this legislation was introduced to aid the home building industry until 2017, when it will expire and the amount will return to 125%.
- **Mr. Cushing** stated that the cost that Stafford and the home owners' associations in Stafford are incurring to complete the roads in accordance with the local and/or state standards is not being covered by the amount of money left by the developer in the performance bonds after the 90% release. Mr. Cushing stated that after the 90% release, the localities are left with an amount that could not reasonably cover the cost of completing the deteriorating roads.
 - **Mr. Toalson** asked where the fault should lie that the amount of money left by the performance bond is insufficient to maintain the project.
 - **Mr. Cushing** answered that he did not know whether the problem is anyone's fault, but that he remains focused on finding a solution for the taxpayers and home owner association members in Stafford.
 - **Mr. Toalson** stated that the fault lies with the localities because the local governments establish the performance agreement, dictate the performance bond amount, set the performance bond release schedule, and release the performance bond amounts.

- **Mr. Cushing** stated that he believes the problem is that §15.2-22-45 mandates performance bond releases to 90%. Mr. Cushing explained that when a developer completes 90% of a project and requests release, the locality releases 90% of the anticipated cost of construction from the bond. Mr. Cushing explained that in Stafford, several developers have abandoned their projects after receiving their 90% releases. Mr. Cushing explained that due to a lack of funding, the roads in these subdivisions have remained incomplete for 10 years. Mr. Cushing stated that as a result of the years of deterioration, the cost to complete the roads and get them up to the state standard often costs 50-80% of the anticipated cost of construction for the road-- and is not covered by the remaining 10%.
- **Mr. Michael T. Smith**, *Director, Department of Public Works, Stafford County*; stated that over the past 5 years, Stafford County has been forced to pay nearly \$1.8 million in county funds to complete roads in 12 subdivisions where the amount left from the performance bonds were insufficient to complete the projects.
 - **Mr. Smith** explained how this problem has come about in Stafford. Mr. Smith started by stating that many times developers complete the roads during the first phase of construction of a subdivision, and then build homes in the second phase. Mr. Smith explained that construction crews and residents use the roads of the subdivision and cause deterioration even prior to the subdivisions completion. Mr. Smith explained that it can take up to ten years for a subdivision to be completed. Mr. Smith stated that many developers complete the projects without a problem, but where a developer abandons a subdivision project the locality or the home owners association is left to repair the roads.
 - **Mr. Smith** explained that Stafford does not need to secure more money from developers for the performance bonds; rather, Stafford needs to keep a larger percentage of the performance bonds until the roads are accepted into the system of the locality or the state.
- **Del. Marshall** asked how many subdivision roads Stafford County had to complete prior to the economic downturn.
 - **Mr. Smith** stated that he is new to the director position and that he is uncertain how many times this issue occurred prior to the economic downturn. Mr. Smith stated that when the economy was good, the securities were not taken care of quite as carefully as they are now.
- **Del. Marshall** asked whether the counties surrounding Stafford have experienced any of the same problems and whether counties throughout the state have suffered similar issues.
 - **Mr. Roger Wiley**, *Representing Loudoun County among other localities; Hefty & Wiley, P.C.*; stated that Loudoun County has experienced similar problems to Stafford County. Mr. Wiley stated that he was also personally involved in a problem similar to Stafford's in Amelia. Mr. Wiley stated that the problem in Amelia was resolved by involving the developer and the local bank that held the loan. Mr. Wiley stated that the problem in Amelia was difficult to work out. Mr. Wiley stated that the longer a locality is permitted to hold on to the performance bond money, the better off the locality is in trying to maintain roads until they are entered into the state's system.
 - **Del. Marshall** asked whether this problem started as a result of the economic downturn in 2008.

- **Mr. Wiley** responded that there were cases of a similar problem before the recession started, but that the problem has become more widespread as a result of the recession. Mr. Wiley explained that the problem has tended to occur in larger counties where a lot of development projects were being built at the same time. Mr. Wiley explained that when the market turned downward, those counties suffered the most because of the cumulative amounts needed to pay for completing various subdivisions' roads.
- **Mr. Toalson** stated that trying to get a release from a bond is very often a difficult, arduous process for developers and typically involves local government, experienced engineers, the construction company, Virginia Department of Transportation inspectors, and the developer.
 - **Mr. Smith** stated that he agreed with Mr. Toalson's representation of the issue.
- **Mr. Smith** explained that at the time the localities agreed to release at 90% completion, the localities and the developers were unaware of how long completing the subdivisions would take and how much the streets would deteriorate during the completion of the subdivision. Mr. Smith explained that the state will not accept roads into its system until the developer, locality, or the home owners' association completes the needed repairs to the roads. Mr. Smith stated that oftentimes the roads are left to deteriorate for 5 to 10 years without anyone maintaining them.
- **Mr. Toalson** asked whether Mr. Smith was responsible for this in other counties.
 - **Mr. Smith** answered that he has not been responsible for this in any other places.
- **Mr. Toalson** stated that in his work experience developers will accept less than a 90% release of their performance bond from a locality despite the state code, where the locality tells the developer that "things are slow [and] who knows how long [it will take for] . . . the houses [to be] built."
 - **Mr. Smith** stated that he and Stafford generally try to abide by the state code.
- **Mr. Toalson** stated that he has been asked by **Mr. Matt Bernie** to share *The Virginia Bankers Association's* opposition to HB 731. Mr. Toalson stated that most of the performance bonds are unsecured letters of credit. Mr. Toalson further explained, stating that financial institutions are under tremendous pressure from federal regulators regarding unsecured credit. Mr. Toalson stated that placing a longer holding period for the unsecured credit will mean more pressure from federal regulators.
- **Del. Bulova** expressed his preference that localities follow the code as it is written, as Mr. Smith has done. Del. Bulova also stated that he does not want localities to be faced with the decision to either not follow the code or put themselves in financial jeopardy. Del. Bulova asked Mr. Toalson whether he could envision a way that §15.2-22-45 could be tweaked without being rewritten to account for situations where a locality may want to give an 80% release, rather than a 90% release.
 - **Mr. Toalson** responded that he is convinced that the statute is well drafted and that it does not need to be tweaked or amended. Mr. Toalson stated that when the economy turns around and housing returns to its normal levels that this problem will fade away.
 - **Del. Bulova** stated that he appreciates that this problem is likely due to the economic downturn and is thus temporary. Del. Bulova stated that he also appreciates that this problem not widespread. Accordingly, Del. Bulova stated that he thinks it is unlikely that the statute needs to be rewritten. Del. Bulova also stated that despite these things, he does not want Stafford and other affected areas to be left paying \$1.8 million. Del.

Bulova stated that he would like the Work Group to craft some sort of a solution for affected areas.

- **Mr. Toalson** responded that the legislation currently allows localities to demand a performance bond for 10% more than the anticipated cost of construction and that prior to 2009 and likely after 2017, the localities will be permitted to demand a performance bond for 25% -35% more than the anticipated cost of construction. Mr. Toalson explained that these amounts are added to the performance bond to prevent this type of problem from occurring and that the problem is not with the current statute, but with Stafford's execution.
- **Mr. Mark Flynn**, *Virginia Municipal League*; expressed his confusion regarding how the statute currently works. Mr. Flynn stated that the law currently requires localities to complete partial releases unless it receives a non-receipt of approval by the Virginia Department of Transportation (VDOT). Mr. Flynn stated that he does not understand why the localities do not wait to make the releases until the roads are approved 90% completed by VDOT.
 - **Mr. Smith** responded, stating that VDOT and the locality inspect the roads to ensure that the roads are the correct percentage complete before the locality releases that same percentage of the performance bond. Mr. Smith explained that despite being approved as 90% complete by VDOT, VDOT will not accept a road into its system until it is 100% complete and up to VDOT standards. Mr. Smith explained that the road might have been 90% complete upon the 90% release, but may now have deteriorated to the point that it requires more than the remaining 10% performance guarantee to be completed and entered into the state system.
- **Mr. John Napolitano**, *Home Builders Association of Virginia; Sr. Vice President, Napolitano Homes, Virginia Beach*; explained that he has not experienced the problems that Mr. Cushing and Mr. Smith described where he develops in Virginia Beach.
 - **Mr. Napolitano** explained that under the current law developers have interests in completing projects quickly and in accordance with their performance agreement. Mr. Napolitano stated that most developers complete projects in phases and that each phase has independent bonds. Mr. Napolitano explained that in addition to receiving partial releases throughout the project, when a developer completes 100% of a certain phase of a project, the developer receives 100% of the bonds back that are associated with that phase. Mr. Napolitano stated that as a result of wanting their credit to apply towards bonds for new projects or new phases of the same project, most developers want to complete each phase quickly and make sure their inspectors and workers are doing their jobs. Mr. Napolitano stated that the longer performance bonds are held, the longer developers' credit is tied up and the more difficult it is for developers to continue to develop new homes.
 - **Mr. Brian Gordon**, *Apartment and Office Building Association*; stated that though multifamily and commercial developments are also subject to performance bonds, he has not heard of any problems like Stafford's in any of those developments. Mr. Gordon stated that he agrees with Mr. Napolitano: that holding performance bonds for a longer period of time will greatly impede developer's ability to complete other phases of the same project or new projects.
 - **Mr. Napolitano** explained that where developers do their jobs correctly, the counties should not be left to complete roads under the current laws. Mr. Napolitano stated that

roads are bound to deteriorate if they are left incomplete for years, but that he does not know of any developers that leave roads in a subdivision incomplete for 5-10 years. Mr. Napolitano explained that bonds for roads include lighting, parks, walks, drainage, landscaping, as well as the road itself. Mr. Napolitano stated that he currently has two bonds for roads in subdivisions; one bond is for \$256,000 and the other is for \$495,000. Mr. Napolitano stated that he and other developers work to get their developments' roads accepted by VDOT as quickly as possible in order to be released from the bond for roads. Mr. Napolitano explained that in order to ensure projects are completed in accordance with performance agreements and in a timely fashion, he and many other developers monitors sites through the use of cameras. Mr. Napolitano explained that he does this to ensure quality and to complete his projects quickly.

- **Mr. Napolitano** asked whether the proposed bill would allow localities to keep 100% of the bonds for the roads (which, as indicated above include the costs of lighting, parks, walks, drainage, and landscaping) or whether it would allow localities to keep only the percentage of the bond that is associated with asphalt.
- **Del. Dance** asked whether there were any other comments regarding HB 731 and explained the purpose and importance of hearing both sides of the debate regarding HB 731.
 - **Mr. Ted McCormack**, *Virginia Association of Counties*; stated that he recommends that HB 731 be adopted, but that it expire in 2017 when the 10% hold back returns to 25% or greater.
 - **Del. Marshall** motioned that HB 731 be gently laid on the table.
 - **Del. Dance** seconded Del. Marshall's motion and asked for the Work Group to vote on the motion. Two Work Group members opposed the motion, and all others approved. HB 731 was gently laid on the table.

III. Appraisals Study; assessments with environmentally sound construction (HB 433, Del. Robert Tata, 2012; SB 507, Sen. Frank W. Wagner, 2012)

- **Mr. Mark Courtney**, *Deputy Director, Licensing and Regulations, Department of Professional and Occupational Regulations*; introduced Mr. Kevin Heff to the Work Group.
- **Mr. Kevin Heff**, *Education and Board Administrators of the Virginia Real Estate Appraising Board*; stated that earlier in 2012, Governor McDonnell signed into law companion bills HB 433 and SB 507 which require that the Virginia Real Estate Appraising Boards evaluate the development of a continuing education curriculum for appraiser licensees. Mr. Heff explained that such continuing education includes the effects and use of energy efficient and renewable energy equipment on the determination of their fair market value and the appraisal of non-income producing residential Real Estate. Mr. Heff stated that the board is required to report its findings to VHC by November 1, 2012 and that it has conducted research on this subject to assist in preparing the draft report for consideration at the Board's August 14, 2012 meeting.
 - **Mr. Heff** provided the Work Group with an update on the status of the Virginia Real Estate Appraising Board's evaluation. Mr. Heff stated that the Board invited public comment on continuing education for appraiser licensees from June 4, 2012 until July 5, 2012 by posting a notice in the Virginia Register. Mr. Heff stated that according to McGraw Hill's 2012 report, new and remodeled green houses are transforming the residential marketplace: green building is one of the fastest growing segments in the

housing industry. Mr. Heff stated that proponents of energy-efficient, green homes argue the increased use of renewable energy sources will provide tangible environmental and economic benefits for all citizens of the Commonwealth, not just those who buy or remodel their home using green principles. Mr. Heff explained that any proliferation of green homes may present new business opportunities and that as a result, appraisers (and other regulated professionals such as architects, engineers, contractors, real estate brokers, and home inspectors) may want to attend training to help tap into these business opportunities. Mr. Heff stated that it is also important to remember that even as the green housing industry is gaining popularity, not all architects will design green homes, not all contractors will build green homes, and not all brokers will market green homes.

- **Mr. Heff** stated the Board now must decide whether existing appraisal continuing education courses offer adequate opportunity for appraisal licensees to learn the proper method of techniques to value such homes. Mr. Heff stated that the Board has included in its report a summary of green evaluation education resources in its report and its findings regarding changes in the continuing education requirements for appraisers. Mr. Heff stated that although general appraisal textbooks and courses do not yet provide extensive guidance regarding evaluating green homes, the specialized education in this field appears to be developing rapidly.
 - **Mr. Heff** stated that the number of special purpose textbooks and courses addressing green housing valuation standards is quickly growing. Mr. Heff stated that professional organizations sponsor (such as the Appraisal Institute) and proprietary schools (such as McKissok, Earth Advantage Institute, and PorterWork, Inc.) offer green courses and green certifications.
 - **Mr. Heff** added that there are many articles on the subject that have been published in appraisal journals and other trade publications.
 - **Mr. Heff** stated that the Qualification Board, which establishes national standards for appraisal licensees' continuing education added green evaluation components to its core curriculum starting January 1, 2015.
 - **Mr. Heff** stated that the recently established Appraisal Practices Board is charged with identifying their recognized methods and techniques of evaluating green homes.
- **Mr. Heff** stated that current legislation requires the Board to submit their report to the General Assembly by November 1, 2012. Mr. Heff explained that the report will include all of the Board's recommendations and their informational bases. Mr. Heff stated that because the Board is already in the process of considering whether appraisal licensees need continuing education regarding valuating green homes and the resulting report will be made available to the Workgroup on November 1, 2012, that the Workgroup does not need to conduct its own study on this topic.
 - **Del. Dance** stated that there are members of the Workgroup that would like to contribute their input prior to the Workgroup making its final decision.
 - **Mr. Heff** stated that there will be a public comment period during which anyone will be able to comment on this topic and the Board's study.
- **Del. Marshall** asked for what the legislation called regarding the Workgroup's role in the study.

- **Mr. Courtney** stated that currently, appraisal licensees are required to complete 28 hours of continuing education over 2 years. Mr. Courtney stated that the Board and the appraising industry want to make sure that adding green building valuation methods as part of the required continued education will not cause problems for the industry.
- **Del. Bulova** clarified with Mr. Courtney that the appraisal licensing industry already has the power to implement regulations requiring green housing valuation methods be part of appraisal licensees' continued education, and that the study is for the purposes of getting the General Assembly's input. **Mr. Courtney** agreed.
- **Mr. Toalson** apologized for missing the public comment period for this regulation. Mr. Toalson stated that he is involved in EarthCraft Housing Program, the most successful single-family state-wide green building program in the nation. Mr. Toalson stated that one of the frustrations that he and his partners face in building green homes is that the appraisals often do not reflect the amount of money that was spent on making the home energy efficient.
- **Mr. Chip Dicks**, *Virginia Association of Realtors*; stated that the problem with changing the appraisal licensee's education to include green housing valuation methods is that the resulting values might not be accepted by Fannie and Freddie and FHA. Mr. Dicks explained that appraisers are required to adhere to the USPAP standards and that the current USPAP standards do not allow increases in values of properties as a result of green features.
 - **Del. Dance** asked Mr. Dicks whether he has given his input regarding changing the Virginia appraisers' standards.
 - **Mr. Dicks** stated that he has not submitted a formal opinion but that he has engaged in discussion about this topic with appraisers and member of the community of appraiser serving on the appraisal board.

IV. Public comment and Adjournments

- **Del. Dance** asked if anyone in the public had any comments to add. Hearing none, Del. Dance adjourned the meeting at 11:05 AM.